

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

STATE OF WASHINGTON,	)	No. 59901-1-I
	)	
Respondent,	)	
	)	
v.	)	
	)	
CINQUE RICHARD GARRETT,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: July 27, 2009
	)	

Ellington, J. — Cinque Garrett's conviction for second degree felony murder was vacated pursuant to In re Personal Restraint of Andress.<sup>1</sup> Garrett was then charged and convicted of second degree intentional murder. This did not violate double jeopardy and the evidence was sufficient. Garrett was also convicted of first degree assault, but the assault merges into the murder. The assault conviction must be stricken. We affirm, but remand for correction of the judgment and sentence.

BACKGROUND

Cinque Garrett and Dennis Bryant were charged with murder in the second degree, assault in the first degree, and unlawful possession of a firearm for their

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<sup>1</sup> 147 Wn.2d 602, 56 P.3d 981 (2002) (holding that under former RCW 9A.32.050 (1976) a conviction of second degree felony murder could not be based upon assault as the predicate felony).

participation in a 1994 shooting incident that resulted in the injury of Derek Burfect and the death of Jacques Burns. Garrett and Bryant were both charged with murder by alternative means: intentional murder and felony murder predicated on assault. The jury was instructed only as to the felony murder alternative means. Both defendants were found guilty. Their convictions were affirmed on appeal.<sup>2</sup>

The felony murder convictions were subsequently vacated pursuant to Andress and In re Personal Restraint of Hinton.<sup>3</sup> The State refiled the charge of second degree intentional murder. The defendants moved to dismiss the charge on several grounds, including double jeopardy, and the trial court granted the motion. On the State's motion for discretionary review, we reversed and remanded for further proceedings on second degree intentional murder.<sup>4</sup>

The evidence at trial established that after watching the annual Seafair Torchlight Parade on the evening of August 6, 1994, Jacques Burns, Derek Burfect, Gary Smith, Ricky Russ, and Russ's five year old son, Ricky, Jr., were walking toward their car at the Seattle Center when Dennis Bryant verbally confronted Burfect about a black bandanna hanging from Burfect's pocket as a symbol of his gang affiliation. Cinque Garrett was standing next to Bryant. Smith told Burfect that Bryant's sister was

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<sup>2</sup> State v. Garrett, 87 Wn. App. 1067 (1997).

<sup>3</sup> 152 Wn.2d 853, 100 P.3d 801 (2004) (holding that convictions for second degree felony murder predicated on assault were invalid on their face, and thus personal restraint petitions were not barred by one year limitations period for collateral attack on criminal judgment and sentence).

<sup>4</sup> State v. Garrett, 132 Wn. App. 1056 (2006). Both Garrett and Bryant initially petitioned for review in the Washington Supreme Court. Garrett later withdrew his petition. Bryant's petition was granted and consolidated with the petition in State v. Wright, 131 Wn. App. 474, 127 P.3d 742 (2006).

a friend of theirs, and Burfect decided to give Bryant “a pass.”<sup>5</sup> The two groups went their separate ways.

The groups encountered each other again a short time later. Garrett and Bryant approached with two associates, one of whom was Larry Filmore. Filmore and Smith started to argue. At Russ’s urging, Smith and his friends turned to walk away from the argument. At that moment, Garrett and Bryant both pulled handguns and started firing in the direction of Burns, Burfect, Russ, and Ricky, Jr.. Smith, who was five or six feet away from Garret and Bryant, saw flashes of gunfire coming from both guns.

Witnesses estimated that between three and ten shots were fired. Both Burfect and Burns were shot. Burns died.

Paul Vincent, a KOMO TV security guard, heard several shots and then saw two sets of two males run towards his location. He ducked into a doorway and watched as the first two ran by. As the next two men approached his location, he heard one saying something like “hiding the gun, put the gun away.”<sup>6</sup> He saw Garrett making a motion consistent with lifting his coat and placing something in his waistband. Vincent then observed Garrett run across the street and stop at a portable restroom at a construction site, heard the sound of a door slammed shut, and then saw Garrett running again. Vincent flagged down a policeman, Lieutenant Donnie Lowe, and told him what he had seen.

Lowe drove south on Fifth Avenue and saw a group of four males running down an alley. They matched the general description he had been given. Lowe stopped the

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<sup>5</sup> Report of Proceedings (RP) (Dec. 12, 2006) at 33.

<sup>6</sup> Id. at 81.

suspects. He recovered a .22 semiautomatic pistol from Bryant's pocket with two rounds in the magazine and one spent casing in the chamber. He found approximately 12 live rounds of .25 caliber ammunition loose in Garrett's pants pocket, but no gun. At the scene of the shooting, police found two .22 caliber and one .25 caliber spent shell casings. The bullet that killed Burns was fired from Bryant's gun.

The State charged Garrett with murder in the second degree and assault in the first degree. He was convicted on both counts. The court entered convictions on both counts, but held they merged and imposed sentence only on the murder charge, according to the parties' agreement.

### ANALYSIS

#### *Double Jeopardy*

Article I, section 9 of the Washington State Constitution and the Fifth Amendment to the federal constitution prohibit multiple punishments for the same offense and subsequent prosecutions for the same offense after acquittal or conviction.<sup>7</sup> Double jeopardy challenges are legal questions we review de novo.<sup>8</sup>

Garrett argues first that his protection against double jeopardy was violated when he was prosecuted after his conviction was vacated following Andress. He contends the decisions in Andress and Hinton were based upon evidentiary insufficiency as to the charge of second degree murder, and were thus tantamount to acquittal. He also

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<sup>7</sup> The Washington Constitution provides the same protections as the federal constitution. In re Pers. Restraint of Orange, 152 Wn.2d 795, 815, 100 P.3d 291 (2004).

<sup>8</sup> State v. Daniels, 160 Wn.2d 256, 261, 156 P.3d 905 (2007).

contends his first jury implicitly acquitted him of intentional second degree murder by finding him guilty only of felony murder.

The Washington Supreme Court has rejected these very arguments. In State v. Wright,<sup>9</sup> which involved Garret's original codefendant Bryant, the court held that Andrew disallowed convictions for felony murder predicated on assault because of invalidity of the charges, not insufficiency of the evidence.<sup>10</sup> The court also held that no implied acquittal on charges of second degree intentional murder occurred where juries were not instructed as to that alternative means and thus had no opportunity to consider factual guilt or innocence on that charge.<sup>11</sup> The court also rejected the contention that jeopardy terminated when the jury was discharged without returning an express verdict on the intentional murder alternative.<sup>12</sup> The court held that retrial on the alternative theory of intentional murder does not offend double jeopardy principles.<sup>13</sup>

Wright is indistinguishable. Garrett's argument fails.

Relying on the Washington Supreme Court's decision in State v. Womac,<sup>14</sup> Garrett next argues that his protection against double jeopardy was violated by entry of a conviction for first degree assault, despite the fact that no sentence was imposed on that count, because the assault merged with the murder.<sup>15</sup>

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<sup>9</sup> 165 Wn.2d 783, 203 P.3d 1027 (2009).

<sup>10</sup> Id. at 796.

<sup>11</sup> Id. at 797.

<sup>12</sup> Id. at 802–03.

<sup>13</sup> Id. at 804–05.

<sup>14</sup> 160 Wn.2d 643, 160 P.3d 40 (2007)

Womac was convicted of homicide by abuse, second degree felony murder, and first degree assault for the death of his four month old son. The court entered judgment on all counts but imposed sentence on the homicide count only.

The Supreme Court directed the trial court to vacate the convictions for felony murder and first degree assault, holding that the three convictions constitute the “same offense” for purposes of double jeopardy, and convictions are “punishments” for purposes of double jeopardy. The Supreme Court explicitly rejected the argument that double jeopardy concerns are implicated only when a defendant receives more than one sentence, as Womac “still suffers the punitive consequences of his convictions.”<sup>16</sup>

Under Womac, Garrett’s conviction on the first degree assault count violates double jeopardy.

#### *Sufficiency of the Evidence*

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential

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<sup>15</sup> Garrett’s judgment and sentence contains four sections, labeled “Hearing,” “Findings,” “Judgment,” and “Order.” In the findings, the court recited that Garrett was found guilty on several counts by jury verdict, including second degree murder (count V) and first degree assault (count I). The court further stated “no sentence to be imposed [on the first degree assault count] pursuant to State v. Ward, 125 Wn. App. 138, State v. Johnson, 113 Wn. App. 482,” and “sentence not entered on count V—merges [with] count I.” Clerk’s Papers at 404–05. In the judgment section, the court adjudged Garrett guilty as set forth in the findings, and again stated “sentence not entered on count V, merges with ct. I.” Id. at 405. The court sentenced Garrett to 180 months of confinement only on count I and imposed no sentence on count V.

<sup>16</sup> Womac, 160 Wn.2d at 656. The court explained that Womac’s convictions, for example, would count in his offender score should he be charged with another crime in the future. Id. Additionally, it noted that the presence of multiple convictions on one’s record may impact parole eligibility, may be used to impeach the defendant’s credibility, and “certainly carries the societal stigma accompanying any criminal conviction.” Id. at 657.

elements of the crime beyond a reasonable doubt.<sup>17</sup>

Garrett concedes he was present next to Bryant when Bryant fired his gun towards Burns and his friends, and also that Garrett himself fired a gun towards the same group. But he contends the evidence was insufficient to prove he was an accomplice to intentional murder because it failed to show he knew Bryant intended to kill Burns.<sup>18</sup>

An accomplice need not have specific knowledge of every element of the crime committed by the principal if he has general knowledge of that specific crime.<sup>19</sup> For intentional murder charge, the law of accomplice liability requires the State to prove that an accomplice knew generally that he was facilitating a homicide, but need not show that the accomplice knew the principal had the kind of culpability required for any particular degree of murder.<sup>20</sup> It is thus unnecessary for the State to prove Garrett's knowledge of Bryant's intent.<sup>21</sup>

The evidence clearly shows that Garrett was present during both verbal altercations preceding the shooting, that when Bryant started shooting at Burns and his friends at close range, Garrett also started shooting at them, and that Garrett fled with

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<sup>17</sup> State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

<sup>18</sup> "A person commits murder in the second degree when: (a) With intent to cause the death of another person but without premeditation, he or she causes the death of such person or of a third person." RCW 9A.32.050(1)(a). "A person is an accomplice of another person in the commission of a crime if: (a) With knowledge that it will promote or facilitate the commission of the crime, he (i) solicits, commands, encourages, or requests such other person to commit it; or aids or agrees to aid such other person in planning or committing it." RCW 9A.08.020(3)(i).

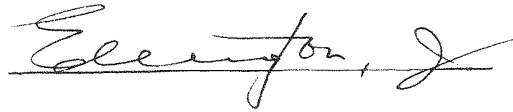
<sup>19</sup> State v. Hoffman, 116 Wn.2d 51, 104, 804 P.2d 577 (1991).

<sup>20</sup> Sarausad v. State, 109 Wn. App. 824, 836, 39 P.3d 308 (2001).

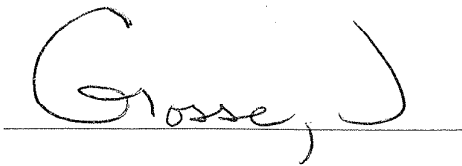
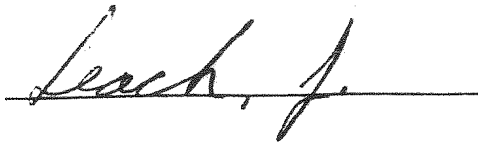
<sup>21</sup> State v. Rice, 102 Wn.2d 120, 125–26, 683 P.2d 199 (1984).

Bryant and their associates. The fact that death may ensue from Bryant's actions was the only logical conclusion Garrett could have drawn when he joined in the shooting. The evidence is sufficient to show that Garrett had general knowledge that he was aiding Bryant in the commission of a homicide, and thus sufficient to convict him as an accomplice to intentional second degree murder.

We affirm the murder conviction, but remand with direction that the assault conviction be stricken from the judgment and sentence.

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WE CONCUR:

A handwritten signature in cursive script, appearing to read "Grosse, J.", written over a horizontal line.A handwritten signature in cursive script, appearing to read "Leach, J.", written over a horizontal line.